

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition to Adopt, Amend or Repeal a
Regulation pursuant to Pub. Util. Code
Section 1708.5.

Petition 13-11-001
(Filed on November 6, 2013)

Order Instituting Rulemaking Regarding
Whether to Adopt, Amend, or Repeal
Regulations Governing the Award of
Intervenor Compensation.

R. _____

**DECISION GRANTING IN PART AND DENYING IN PART THE PETITION OF
THE NEVADA HYDRO COMPANY TO INSTITUTE A RULEMAKING TO
DETERMINE WHETHER TO ADOPT, AMEND, OR REPEAL REGULATIONS
GOVERNING THE AWARD OF INTERVENOR COMPENSATION**

1. Summary

By this Order Instituting Rulemaking we grant in part and deny in part the petition of The Nevada Hydro Company to open a rulemaking into whether to adopt, amend, or repeal our regulations governing the award of intervenor compensation. We open this rulemaking to clarify and harmonize two purposes of the intervenor compensation program: (a) to assure that any intervenor who makes a substantial contribution to a Commission proceeding, regardless of the parties to the proceeding, its characterization or its outcome, receives appropriate compensation; and (b) to indicate clearly to any applicant for a Certificate of Public Convenience and Necessity the circumstances under which its ratepayers or its shareholders, respectively, may be required to bear the cost of an intervenor compensation award. We deny Petitioner's request for an order of

this Commission reimbursing it for intervenor compensation payments previously made pursuant to Decision 11-07-036.

2. Discussion

In Decision (D.) 00-01-020, which concluded Rulemaking (R.) 97-01-009, the Commission established a procedure for compensating intervenors who make a substantial contribution to a quasi-legislative proceeding affecting an entire industry or multiple industries would be eligible for compensation. To achieve this goal, the Commission created an intervenor compensation program fund (Fund) from which such awards could be paid. The Fund is financed through the fees collected on an annual basis from regulated energy, telecommunications and water utilities under Public Utilities Code (Pub. Util. Code) Section 401 authority.

We are opening this rulemaking to consider whether further modifications of the intervenor compensation program are necessary and desirable. In particular, we wish to address the situation in which an intervenor makes a substantial contribution to a ratemaking proceeding that concludes with the denial of an application for a certificate of public convenience and necessity (CPCN) filed by an entity not subject to our jurisdiction. Two types of problems have been identified in connection with such proceedings. First, the intervenor may receive no compensation in spite of having made a substantial contribution because the unsuccessful applicant for a CPCN is not subject to our jurisdiction under the relevant sections of the Pub. Util. Code. Second, an unsuccessful out-of-state utility applicant for a CPCN that pays an intervenor compensation award may not be able to pass the cost of such award on to its ratepayers as contemplated by Pub. Util. Code § 1807.

Intervenor compensation obligations imposed on individual public utilities are based on Pub. Util. Code §§ 1801 et seq and specifically on Pub. Util. Code § 1807, which provides in relevant part:

Any award made under this article shall be paid **by the public utility** which is the subject of the hearing, investigation, or proceeding...(Emphasis supplied.)

D.00-01-020 broadly interpreted the phrase “public utility” to include groups of public utilities that comprise an industry and all of whom would be similarly impacted by changes in Commission policy adopted in quasi-legislative proceedings. We based this interpretation on the power to impose fees on all public utilities conferred on us by Pub. Util. Code § 401:

The Legislatures further finds and declares that funding the commission by means of a reasonable fee imposed on each common carrier and business related thereto, [and] **each public utility** that the commission regulates ...is in the public interest. (Emphasis supplied.)

and the expansive general powers conferred on us by § 701:

The commission may supervise and regulate **every public utility** in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Emphasis supplied.)

A corporation that is not operating as a public utility is by definition not a public utility¹ and therefore not within the literal meaning of these sections of the statute. In particular, an unsuccessful applicant for a CPCN that does not offer public utility services and refuses to pay an intervenor compensation award

¹ Such an applicant might be a licensed public utility in another state seeking to do business in California. But we have no jurisdiction over such an applicant unless it operates as a public utility in California. See Pub. Util. Code § 216(c).

cannot be required to do so. In addition, applications for a CPCN are classified as ratemaking proceedings. They are not within the extension of the intervenor compensation regime to quasi-legislative proceedings established by D.00-01-020 and intervenors cannot look to the Fund for compensation in the event an unsuccessful applicant fails to pay an award. Finally if an out-of-state utility that has unsuccessfully applied for a CPCN has nonetheless paid an intervenor compensation award, we cannot authorize it to pass the costs on to its own ratepayers even though it would be authorized to do so if it had acquired a CPCN. As a result, such costs must be borne by the out-of-state utility's shareholders. That is the situation of Petitioner in this case and is the reason why we deny the request for reimbursement of intervenor compensation payments made pursuant to D.11-07-036.

We believe the public interest is clearly served when an intervenor makes a substantial contribution to a ratemaking proceeding that results in the denial of an application for a CPCN. But the prospect that they may not get paid deters potential intervenors from entering such proceedings. Out-of-state utilities who want to do business in California are also deterred from seeking a CPCN if they cannot pass the costs of intervenor compensation awards on to their ratepayers.

To address these situations, we propose to consider three alternative modifications of our current intervenor compensation program.

Alternative 1: Make the Fund available to otherwise uncompensated intervenors in ratemaking proceedings. Under this alternative, an intervenor that is unable to collect an award either from a utility subject to our jurisdiction or from an unsuccessful applicant for a CPCN could be compensated from the Fund.

Alternative 2: Require any applicant for a CPCN to agree to pay a related intervenor compensation award or awards as a condition of accepting the application. To provide security for the agreement to pay, require every applicant for a CPCN to post a bond in an amount set by the presiding Administrative Law Judge or as otherwise determined in this rulemaking.

Alternative 3: Pay all intervenor compensation awards, whether in ratemaking or quasi-legislative proceedings, from the Fund. This alternative would require increasing the monthly fees paid by customers of regulated energy, telecommunications and water utilities within the state. The process of determining whether an intervenor has made a substantial contribution to a proceeding would remain unchanged.

The state's electric, gas, water, and telephone utilities are respondents to this Rulemaking, and are placed on notice that they shall be subject to Commission orders in this matter.

3. Preliminary Scoping Memo

We preliminarily determine the category is quasi-legislative. We make this determination given that our purpose in this rulemaking is to ensure that the state receives the maximum benefit from the intervenor compensation program by assuring that all intervenors that make substantial contributions to Commission proceedings are compensated for their contributions. This broad public purpose is embraced within our definition of quasi-legislative proceedings:

'Quasi-legislative' proceedings are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry. (Rule 1.3(d).)

This preliminary determination is not appealable, but shall be confirmed or changed by assigned Commissioner's ruling. The assigned Commissioner's determination as to category is subject to appeal. (Rules 7.3 and 7.6.)

4. Need for Hearing

We anticipate that the issues raised by this decision can be addressed in workshops, by filed comments and briefs, or by receipt into evidence of served proposed testimony without cross-examination. Therefore, we preliminarily determine that hearings are not necessary. (Rule 7.1(d).) The assigned Commissioner's Scoping Memo, after hearing the comments and recommendations of parties, will determine the need for hearing. (Rule 7.3(a).)

5. Issues

We invite comment on the three alternatives listed above and in particular we invite responses to the following questions:

1. Which alternative(s) could be adopted by Commission action without additional enabling legislation?
2. Which alternative(s) most equitably distribute the cost of the intervenor compensation program between the state's certificated utilities, on the one hand, and individual applicants for CPCNs on the other?
3. What other mechanisms, if any, could be adopted to ensure that all intervenors who make substantial contributions to a Commission proceeding receive compensation?
4. What other mechanisms, if any, could be adopted to ensure that unsuccessful out-of-state applicants for a CPCN may pass on the cost of intervenor compensation to their ratepayers?

6. Schedule

The schedule should include provisions for comments on this Order Instituting Rulemaking (OIR), a prehearing conference (PHC), and the identification of preliminary information to begin our work.

7. Comments on the OIR

Comments on this OIR may be filed and served, and shall be filed and served within 21 days of the date this OIR is issued. Comments shall state any objections to the preliminary scoping memo regarding category, need for hearing, issues to be considered, or schedule. (Rule 6.2.) Reply comments may be filed and served, and shall be filed and served within seven days of the filing date of comments. To the extent known at the time, comments and reply comments should include the party's specific, exact wording for recommended issues, and specifics for schedule and other items.

Any comments recommending changes to the proposed schedule must be consistent with the proposed category, including a deadline for adopting standards and requirements by December 31, 2014, and resolving the proceeding within 18 months of the date the Scoping Memo and Ruling is issued. All comments which contain factual assertions must be verified. Unverified factual assertions will be given only the weight of argument. (Rule 6.2; Pub. Util. Code § 1701.5(a).)

8. Prehearing Conference

The assigned Commissioner or Administrative Law Judge (ALJ) shall set a PHC for 45 to 60 days from today, or as soon as practicable. The ruling setting the PHC may also set a date for PHC statements. (Rule 7.2.) PHC statements, if any, should state with specificity the party's recommendations for anything necessary to complete the assigned Commissioner's Scoping Memo, plus

anything else necessary to reasonably proceed with this proceeding. For example, PHC statements should, to the extent feasible, include the party's recommended exact proposed wording for issues, specific dates for the schedule, and necessary detail for hearing (to the extent known at that time). Moreover, to the extent possible, parties should employ their best efforts to prepare a joint PHC Statement reflecting agreement on issues, schedule and other matters for the Scoping Memo. If unable to reach complete agreement on all matters, parties may file a joint PHC Statement reflecting partial agreements, with separate supplemental PHC Statements reflecting individual differences. Alternatively, they may adopt the PHC Statement of one lead party with identification of limited exceptions.

We rely on respondents and parties to advise the Commission at the PHC regarding the most efficient way to proceed. Taking the recommendations of parties into account, we leave the details to the assigned Commissioner or ALJ.

9. Adopted Schedule

The preliminary adopted schedule is summarized below. It may be supplemented or changed by the assigned Commissioner or ALJ as necessary to promote efficient and equitable development of the record, and we expect that schedule modifications will occur. It is anticipated that portions of this proceeding shall be resolved by December 31, 2014, with the entire proceeding resolved within 18 months of the date the Scoping Memo is issued.

(See § 1701.5.).

ADOPTED SCHEDULE

LINE NO.	ITEM	DATE
1.	Requests to Process Office for inclusion on service list	14 days from date OIR issued
2.	Comments on OIR	21 days from date OIR issued
3.	Reply Comments on OIR	Seven days from filing of

		comments
4.	PHC Statements	To be determined
5.	PHC	45 to 60 days from date OIR issued or as soon as practicable
6.	Evidentiary Hearings if necessary	To be determined
7.	Projected Submission Date	To be determined

10. Service of OIR

In the interest of broad notice, a notice of availability of this OIR shall be served on the Petitioner and those who filed a response to the Petition, and the state's electric, gas, water, and telephone utilities. In addition, a notice of availability of this OIR shall be electronically served on the intervenors for which the Commission has electronic mail (e-mail) addresses. Service of this OIR does not confer party status in this rulemaking proceeding or result in any person or entity being placed on the service list for this proceeding.

11. Participation and Service List

Petitioner The Nevada Hydro Company and those who filed a response to the Petition are automatically parties to this newly instituted rulemaking proceeding pursuant to Rule 1.4(a)(1) and (2). Any person or entity that files comments in this rulemaking proceeding pursuant to Rule 1.4(a)(2)² will automatically become a party. Other persons and entities may request party status in this proceeding by motion pursuant to Rule 1.4(a)(3) or (4).

Any person or entity that wants to monitor this proceeding may be added to the official service list for this proceeding as "Information Only" by sending a request to the Commission's Process Office by e-mail

² The due date for filing and serving comments in this rulemaking proceeding is set forth previously in this preliminary scoping memo.

(Process_Office@cpuc.ca.gov) or by letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102). The request must include the following information:

- Docket Number of this rulemaking proceeding.
- Name of the person (and the entity represented, if applicable).
- E-mail address (if available).
- Postal address.
- Telephone number.
- Desired status (State Service or Information Only).³

The Commission's practice is to list only one representative per party in the "Parties" category of the official service list. Other representatives for the same party may be placed on the service list in the "State Service" category or the "Information Only" category.

To ensure receipt of all documents, requests to be added to the service list should be sent to the Process Office as soon as practical. The Commission's Process Office will publish the official service list on the Commission's website (www.cpub.ca.gov) and will update the list as necessary.

12. Updating the Service List

Each person on the official service list is responsible for ensuring that the information they have provided is correct and up-to-date. This information can be changed, corrected and updated by sending an e-mail or letter to the Process Office, with a copy to everyone on the official service list.

³ Non-parties, other than those eligible for addition to the service list as "State Service," must provide an e-mail address in order to receive service of documents that are not required to be served by hard copy. (See Rule 1.10(b).)

13. Filing and Serving Documents

All pleadings in this proceeding shall be filed and served in conformance with Article 1 of the Commission's Rules of Practice and Procedure. The assigned Commissioner and the assigned ALJ may establish additional requirements for filing and/or serving documents in this proceeding.

The Commission encourages electronic filing and service. (Rules 1.10 and 1.13.) Rule 1.10 provides for concurrent e-mail service of documents, in a searchable format, to all persons on the service list who provided an e-mail address. If no e-mail address was provided, service must be made by U.S. mail or similar means, except that paper service is not required on those in the Information Only category without an e-mail address.

E-mail communications in this proceeding should include on the subject line the docket number for this proceeding and a brief description of the contents of the e-mail (e.g., motion for party status, opening comments, etc.).

Questions about the Commission's filing and service procedures may be directed to the Commission's Docket Office by telephone at (415) 703-2121, by e-mail at efile-help@cpuc.ca.gov, or by letter to Docket Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102.

14. Subscription Service

Persons may monitor the proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission's website. There is no need to be on the official service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission's website at <http://subscribecpuc.cpuc.ca.gov/>.

15. Public Advisor

Any person or entity interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco by telephone at (415) 703-2074 or (866) 849-8390, or by e-mail at public.advisor@cpuc.ca.gov. The TTY number is (866) 836-7825. Written communication may be sent to Public Advisor, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102.

16. Intervenor Compensation

Any party that expects to claim intervenor compensation for its participation in this rulemaking shall file its notice of intent to claim intervenor compensation no later than 30 days after the PHC. (*See* Rule 17.1.) Parties should use the standardized form attached to the Intervenor Compensation Program Guide, which may be found at:

<http://www.cpuc.ca.gov/PUC/IntervenorCompGuide/index3.htm>. Questions may be directed to the Commission's Public Advisor.

17. Ex Parte Communications

Communications with decision makers and advisors in this rulemaking are governed by Article 8 of the Rules of Practice and Procedure. (Rule 8.1, et seq.) *Ex parte* communications are allowed without restriction or reporting requirement in a quasi-legislative proceeding. (Rule 8.3(a).) No *ex parte* restrictions or reporting requirements apply in this proceeding.

18. Assignment of Proceeding

For this rulemaking, Michel Peter Florio is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ.

O R D E R

IT IS ORDERED that:

1. The petition of The Nevada Hydro Company to open a rulemaking to determine whether to adopt, amend or repeal provisions of the Commission's intervenor compensation rules is granted. A rulemaking proceeding is instituted to clarify and harmonize two purposes of the intervenor compensation program: (a) to assure that any intervenor who makes a substantial contribution to a Commission proceeding, regardless of the parties to the proceeding, its characterization or its outcome, receives appropriate compensation; and (b) to indicate clearly to any applicant for a Certificate of Public Convenience and Necessity the circumstances under which its ratepayers or its shareholders, respectively, may be required to bear the cost of an intervenor compensation award.
2. The petition of The Nevada Hydro Company for an order of this Commission reimbursing it for intervenor compensation payments made pursuant to Decision 11-07-036 in the amount of \$74,535.74 is denied.
3. This Order Instituting Rulemaking is adopted pursuant to Public Utilities Code Sections 768, 7710-7718, and 1708.5 and Rule 6.3 of the Commission's Rules of Practice and Procedure.
4. The preliminary categorization is quasi-legislative.
5. The preliminary determination is that hearings are not needed.
6. The preliminary scope of issues is as stated in the body of this order.

7. Unless changed by the assigned Commissioner or Administrative Law Judge, the schedule stated in the body of this order is adopted. It is the Commission's intent to resolve some issues by December 31, 2014, and to resolve the full proceeding within 18 months of the date the Scoping Memo is issued.

8. The state's electric, gas, water, and telephone utilities are respondents to this Rulemaking, and are placed on notice that they shall be subject to Commission orders in this matter.

9. The official service list shall be created as described in the body of this order, and will be posted on the Commission's web page for this proceeding 15 days from the date this order is issued, or shortly thereafter.

10. Parties shall file and serve documents as described in the body of this order.

11. A person expecting to file an intervenor compensation claim for participation in this proceeding shall file a notice of intent to claim intervenor compensation no later than 30 days after the date of the prehearing conference.

12. *Ex parte* communications in this proceeding are permitted without restriction or reporting requirements.

13. Petition 13-11-001 is closed.

This order is effective today.

Dated _____, at San Francisco, California.